

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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| In the Matter of |) | |
| Gila River Telecommunications, Inc. |) | |
| Petition for Wavier of Section 54.209 |) | Docket No. 96-45 |
| of the Commission's Rules. |) | |

PETITION FOR WAIVER

Gila River Telecommunications, Inc., ("Petitioner" or "GRTI"), by its undersigned attorneys, and pursuant to Section 1.3 of the Commission's rules, respectfully petitions the FCC for a waiver of the Commission's rules so that the company can receive universal service fund ("USF") support for the first quarter of 2008. Specifically, Petitioner requests a waiver of Section 54.209 of the Commission's rules¹ because the Universal Service Administrative Company ("USAC") notified GRTI on October 10, 2007, that it would not receive USF support for that period as GRTI had not filed a report as purportedly required by that section.

A waiver is warranted because (1) the policy objectives of Section 54.209 would not be vitiated as there are other means for the Commission to ensure compliance with USF eligibility requirements; (2) neither the Gila River Indian Community (the "Tribe"), which regulates GRTI, nor the Arizona Corporation Commission (the "ACC"), which regulates other telephone companies operating in Arizona, requires GRTI or telephone companies operating in Arizona to file such a report; (3) the Tribe did not receive the requisite notice and consultation from the FCC that GRTI was required to file a report pursuant to Section 54.209; (4) as a rural carrier providing service to underserved Tribal lands, the failure to receive support for three months will have a significant adverse and harmful impact on members of the Tribe served by GRTI; and (5)

¹ 47 C.F.R. § 54.209.

a waiver is not required in any event because Section 54.209 is not in effect because the FCC did not publish the effective date of that rule in the Federal Register.

Accordingly, Petitioner respectfully requests that the Commission, to the extent necessary, grant a waiver of Section 54.209, and direct USAC to provide GRTI with USF support going forward, including the first quarter of 2008, without the need for GRTI to file further reports pursuant to that section. In support hereof, Petitioner states as follows:

I. BACKGROUND

GRTI is a rural independent local exchange carrier that provides telecommunications service to subscribers living on the Gila River Indian Reservation in Arizona. GRTI is wholly-owned and regulated by the Gila River Indian Community of the Gila River Indian Reservation, which is an Indian tribe acknowledged by the federal government as having a government-to-government relationship with the United States and eligible for programs and services established by the United States for Indians.²

The Tribe formed GRTI to purchase the telephone system and study area serving the Reservation from U.S. West in 1988. The Gila River Indian Reservation (the “Reservation”) occupies over 372,500 acres near Phoenix, Arizona, and the Tribe has approximately 18,273 enrolled members. Prior to the formation of GRTI, the Reservation was practically an unserved area, with less than 10 percent of Tribe members receiving telecommunications service. Through the diligent efforts of the Tribe through GRTI, the Tribe has increased service access to Tribe members and businesses by approximately 650 percent.

On February 27, 1998, the Commission granted GRTI’s request to be designated as an eligible telecommunications carrier (“ETC”) by the FCC for purposes of receiving federal

² See *The Federally Recognized Indian Tribe List Act of 1994*, Pub. L. 103-454, 108 Stat. 4791 (1994); *Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs*, 72 Fed. Reg. 13648, 13649 (2007).

Universal Service Fund (“USF”).³ GRTI sought ETC designation from the Commission because the company was subject to the jurisdiction of the governing body of a distinct federally-recognized Indian tribe, and the ACC did not assert jurisdiction over GRTI.⁴ Indeed, the Commission concluded that GRTI was not subject to the jurisdiction of the ACC for ETC purposes.⁵ Since 2000, through the support of the USF, GRTI has extended service to nearly 1,000 eligible tribal customers who otherwise could not afford telephone service on their own.

In 2005, the FCC issued a Report and Order in which it recommended that state commissions adopt new reporting requirements, which are now codified at Section 54.209 of the Commission’s rules. Neither the Tribe nor the ACC requires ETCs to file such reports, and the FCC did not engage in any consultation with the Tribe regarding whether the new regulatory requirement should be imposed on GRTI.⁶ On October 10, 2007, USAC notified GRTI that it would not receive USF support for the first quarter of 2008 because it had not filed by October 1, 2007, a Section 54.209 report. In order to avoid loss of USF support for the first quarter of 2008, and what is projected to be approximately 13-15% of its regulated revenues, GRTI filed its Section 54.209 report with the FCC on October 18, 2007, pending consultation between the Tribe and the FCC. GRTI also files the instant Petition for Waiver, to the extent necessary, and requests that the Commission direct USAC to provide GRTI USF support going forward,

³ *In re Designation of Fort Mojave Telecommunications, Inc., Gila River Telecommunications, Inc., San Carlos Telecommunications, Inc., and Tohono O’odham Utility Authority as Eligible Telecommunications Carriers Pursuant to Section 214(e)(6) of the Communications Act*, Memorandum Opinion and Order, 13 FCC Rcd 4547 (1998) (“ETC Designation Order”).

⁴ *ETC Designation Order* ¶ 3.

⁵ *Id.* ¶ 4.

⁶ State commissions, such as the Arizona Corporation Commission may, but are not required to, adopt regulations obligating ETCs to file reports pursuant to Section 54.209. *In re Federal-State Joint Board on Universal Service*, Report and Order, 20 FCC Rcd 6371, ¶ 71 (2005) (“USF Report and Order”). In this case, GRTI is regulated by the Tribe, which is a sovereign government that meets the definition of a “state commission” set forth in the FCC’s rules and the Communications Act of 1934, as amended. *See* 47 U.S.C. § 153(41); 47 C.F.R. § 54.5.

including the first quarter of 2008, without the need for GRTI to file further reports pursuant to that section.

II. DISCUSSION

A. Standard for Waiver

In general, the Commission's rules may be waived only for good cause shown.⁷ The Commission may exercise its discretion to waive a rule where the particular facts make strict compliance inconsistent with the public interest.⁸ In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis.⁹ Waiver of the Commission's rules is therefore appropriate only if the requested relief would not undermine the policy objective of the rule in question, special circumstances warrant a deviation from the general rule, and such deviation will serve the public interest.¹⁰

In this case, the policy objectives of Section 54.209 of the Commission's rules would not be undermined because the filing of the report is not mandatory for all ETCs, with many carriers being exempt from the filing requirements altogether because numerous state commissions or other appropriate regulatory bodies, including the Tribe and the ACC, have not adopted the FCC's recommended reporting requirement. Furthermore, special circumstances exist here because GRTI is wholly-owned and regulated by the Tribe. As such, the federal government and the FCC have a fiduciary and trust relationship with the Tribe, and the FCC has established a policy of consulting with federally-recognized Indian tribes before imposing new regulatory

⁷ 47 C.F.R. § 1.3.

⁸ *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969) ("*Wait Radio*"), *cert. denied*, 409 U.S. 1027 (1972); *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

⁹ *WAIT Radio*, 418 F.2d at 1157.

¹⁰ *See generally, WAIT Radio*, 418 F.2d 1153; *Northeast Cellular*, 897 F.2d 1164.

requirements. Absent a waiver, GRTI would lose significant and critical USF support that would be used to provide service to underserved and unserved portions of the Reservation, and adversely affect service to indigent members of the Tribe and to the Reservation as a whole. The public interest would be served by granting a waiver, if necessary, to Petitioner to permit the company to continue to provide and expand advanced telecommunications service to rural subscribers on the Reservation.

B. The Policy Objectives Regarding the Filing of the Section 54.209 Report Would not be Undermined by Grant of the Requested Waiver

When the Commission promulgated its new annual reporting requirement in 2005, now codified in Section 54.209, it stated that those requirements would ensure that ETCs continue to comply with the conditions of the ETC designation, and that universal service funds are used for their intended purposes.¹¹ However, the FCC did not require all ETCs to comply with the Section 54.209 reporting requirement. Rather, the Commission encouraged state commissions to adopt the new annual reporting recommendations, and it also urged state commissions to apply the reporting requirements to all ETCs, not just competitive ETCs.¹²

In Arizona, which is the state in which GRTI operates, the ACC does not require ETCs to file Section 54.209 reports with the FCC.¹³ Other states, including Alaska, Connecticut, the District of Columbia, Delaware, Georgia, Louisiana, Maryland, North Carolina, North Dakota, New Hampshire, New Jersey, New York, Ohio, Rhode Island, South Dakota, Tennessee, and Texas, also do not require those reports to be filed with the Commission.¹⁴ The policy objective

¹¹ *USF Report and Order* ¶ 68.

¹² *Id.* ¶ 71.

¹³ Liu, Jing, *State Certification Requirements for Eligible Telecommunications Carriers*, The National Regulatory Research Institute, 07-02, p.4 (2007), available at <http://www.nrri.ohio-state.edu/dspace/handle/2068/1043> (follow View/Open hyperlink at bottom of page).

¹⁴ *Id.*

of ensuring compliance with the conditions of ETC designation would not be undermined by the grant of the requested waiver because it is not required for all ETCs, and almost 40% of the jurisdictions polled do not require such filings. Indeed, the Commission has stated that it may institute an inquiry on its own motion to examine any ETC's records and documentation to ensure that the high-cost support it receives is being used "only for the provision, maintenance, and upgrading of facilities and services" in the areas where it is designated as an ETC.¹⁵

Given that the filing of the Section 54.209 report is not required of all ETCs, and that the FCC has left it up to the state commissions to determine whether to require such filings, it is clear that the Commission contemplated that other means could be used to secure compliance with the FCC's USF rules. Specifically, there are other methods in place, such as the self certification process, the FCC's investigatory powers, and the oversight of state commissions, to ensure that ETCs comply with federal USF eligibility requirements. Accordingly, grant of the requested waiver would not undermine the policy considerations behind Section 54.209 as many ETCs are not required to file annual compliance reports, and other USF compliance mechanisms remain intact.

C. Special Circumstances Exist for Waiver Due to the Federal Government's Responsibility to the Tribe, and the FCC's Policy Regarding Tribal Relations

Section 151 of the Communications Act states, in relevant part, that the FCC's responsibility is:

[T]o make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, Nation-wide and world-wide wire and radio communications with adequate facilities at reasonable charges¹⁶

¹⁵ *USF Report and Order* ¶ 70, n.198 (citing 47 U.S.C. §§ 220, 403; 47 C.F.R. §§ 54.313, 54.314).

¹⁶ 47 U.S.C. § 151.

Consistent with that charge, the FCC issued a policy statement in 2000, in which it “reaffirm[ed] its commitment to promote a government-to-government relationship between the FCC and federally-recognized Indian Tribes.”¹⁷ In its statement, the Commission acknowledged that:

The federal government has a federal trust relationship with Indian Tribes, and this historic trust relationship requires the federal government to adhere to certain fiduciary standards in its dealings with Indian Tribes. In that regard, the Commission recognizes that the federal government has a longstanding policy of promoting tribal self-sufficiency and economic development¹⁸

As discussed above, GRTI is wholly-owned and regulated by the Gila River Indian Community, which is recognized by the federal government as a sovereign self-governing Indian tribe. The FCC has stated that it recognizes the rights of Indian tribal governments to set their own communications priorities and goals for the welfare of their membership. In that regard, the Commission stated that it would “consult with Tribal governments prior to implementing any regulatory action or policy that [would] significantly or uniquely affect Tribal governments, their land and resources.”¹⁹ Indeed, the FCC has recognized the importance of Tribal government involvement and consultation in the ETC process, and has gone so far as to require companies seeking ETC designation over tribal lands to ensure that the appropriate Tribal governments and Tribal regulatory authorities are notified and provided with an opportunity to engage in consultation with the Commission and to comment in the ETC designation proceeding.²⁰

In this case, the Tribe has not required GRTI to file Section 54.209 reports, and it has avoided burdening GRTI with regulatory requirements that have not been imposed by the ACC. As noted above, Arizona, along with 17 other state commissions, have not mandated the filing of

¹⁷ *Statement of Policy on Establishing a Government-to-Government Relationship with Indian Tribes*, FCC 00-207 (rel. June 23, 2000) (“*Tribal Government Policy Statement*”).

¹⁸ *Id.* p.3-4 (footnotes and citations omitted).

¹⁹ *Id.*

²⁰ *USF Report and Order* ¶¶ 66-67.

Section 54.209 reports. The Tribe did not receive any notice or any request for consultation from the FCC or other entities involved in the administration of the federal USF, such as USAC or NECA, that the Section 54.209 reporting requirement may be imposed on GRTI.²¹ Imposing Section 54.209 obligations on GRTI without notice and consultation is fundamentally inconsistent with the FCC's *Tribal Government Policy Statement*, and with the concepts of promoting tribal self-governance and self-determination.

Furthermore, consistent with the federal government's trust relationship with the Tribe, the FCC has stated that it will endeavor to streamline its administrative process and procedures to remove undue burdens placed on Indian tribes, and to assist them in complying with the FCC's statutes and regulations.²² In that vein, the Commission should grant the requested relief, and provide GRTI and the Tribe with the necessary assistance to comply with USF annual reporting requirements. The federal government's responsibilities to the Tribe, and the FCC's commitment to provide notice and conduct consultations with tribal governments before imposing burdensome requirements, presents special circumstances in this case that warrant the requested relief.

D. Grant of the Waiver is in the Public Interest Because it will Promote the Deployment of Telecommunications Service on the Reservation

As the Commission is aware, the statutory goal for the USF set forth Section 254(b) of the Communications Act²³ is to ensure that rural and high cost areas have access to telecommunications services comparable to the services available in urban areas. The federal government's obligation to further the goals of universal service is of particular importance in

²¹ Furthermore, there is some ambiguity in the latest edition of the Code of Federal Regulation regarding whether Section 54.209 is even effective. See Section E, *infra*.

²² *Tribal Government Policy Statement* p.5.

²³ 47 U.S.C. § 254(b)(3).

the context of the Tribe as access to telephone service for Native American households continues to be significantly below national levels, with only 69 percent having basic telephone service in tribal communities, compared with 98 percent nationwide.²⁴

The public interest would be served by granting the requested waiver because it would allow GRTI to receive USF support to continue to provide service to indigent members of the Tribe, and to extend its network to reach unserved or underserved portions of the Reservation. Denying USF support to GRTI would be contrary to the federal government's fiduciary and trust responsibilities to the Tribe, and undermine GRTI's efforts to improve access to telecommunications services to the Tribal community. The loss of three months of USF support represents 13-15% of its annual regulated revenues,²⁵ which would have a significant adverse impact on its ability to carry out its mission to provide service throughout the Reservation.

E. A Waiver May not be Necessary Because the FCC Failed to Provide Notice Regarding the Effective Date of Section 54.209

Although GRTI requests a waiver of Section 54.209 as set forth above, GRTI submits that a waiver is not even required in this case because Section 54.209 is not currently in effect. Section 1.427 of the FCC's rules states that "[a]ny rule issued by the Commission will be made effective not less than 30 days from the time it is published in the Federal Register"²⁶ The FCC noted in the Federal Register, in relevant part, that the new rules are:

Effective June 24, 2005 except for §§ 54.202 and 54.209The Commission will publish a document in the Federal Register announcing the effective date of those sections.

A similar note appears at the end of Section 54.209 in the current edition of the CFR.

²⁴ *Challenges to Assessing and Improving Telecommunications for Native Americans on Tribal Lands*, Statement of Mark Goldstein, GAO-06-513T (March 7, 2006) (www.gao.gov/new.items/d06513t.pdf).

²⁵ GRTI will lose upwards of \$300,000 per month of USF support for each of the first 3 months of 2008, which is a significant amount given the size of the GRTI's operations and the rural nature of the area served.

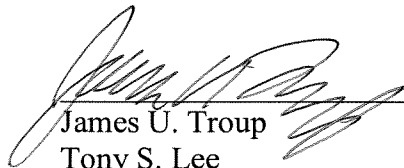
²⁶ 47 C.F.R. § 1.427.

The FCC has not yet published a notice in the Federal Register as required by Section 1.427 announcing the effective date of Section 54.209. Therefore, the public notice required by law has not yet occurred, and the requirement for ETCs to submit reports under that rule do not yet apply. It is a “well settled rule that an agency’s failure to follow its own regulations is fatal to the deviant action.”²⁷ Accordingly, USAC cannot refuse to provide USF support to GRTI for failing to comply with a requirement that is not yet in effect.

III. CONCLUSION

Wherefore, for the foregoing reasons, GRTI respectfully requests that, to the extent necessary, the Commission grant the requested waiver of Section 54.209, and direct USAC to provide GRTI with USF support going forward, including the first quarter of 2008, without the need for GRTI to file further reports pursuant to that section. The delay in the submission of a Section 54.209 report is a minor technicality, while the impact of denying USF support to GRTI and the Gila River Indian Community would have a disproportionately adverse affect on a Native American tribe that the FCC has committed to protect.

Respectfully submitted,



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²⁷ *The Way of Life Television Network, Inc. v. FCC*, 593 F.2d 1356, 1359 (D.C. Cir. 1979) (citations omitted) (holding that the FCC’s failure to publish in the Federal Register the date by which a filing was required to be made rendered the filing deadline without force).